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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 OLYMPIC TUG & BARGE, INC., et
11 al.,

12 Plaintiffs / Counter-
13 Defendants,

14 v.

15 LOVEL BRIERE, LLC,

16 Defendant / Counter-
17 Claimant.

CASE NO. C22-1530JLR

ORDER

18 **I. INTRODUCTION**

19 Before the court is Defendant / Counter-Claimant Lovel Briere, LLC's ("Lovel
20 Briere") motion for leave to file a third amended answer and counterclaims. (Mot. (Dkt.
21 # 46); Reply (Dkt. # 49); *see* Prop. 3d Am. Ans. (Dkt. # 46-1).) Plaintiffs /
22 Counter-Defendants Olympic Tug & Barge, Inc. ("Olympic") and Harley Marine
Financing, LLC (together, "Plaintiffs") oppose Lovel Briere's motion for leave to amend.

(Resp. (Dkt. # 48).) The court has considered the parties' submissions, the relevant portions of the record, and the governing law. Being fully advised,¹ the court DENIES Lovel Briere's motion for leave to amend.

II. BACKGROUND

This case arises from Lovel Briere's attempt to unilaterally increase the monthly charter hire rate for the barge LOVEL BRIERE (the "Vessel"), which Plaintiffs operate pursuant to a bareboat charter agreement (the "Agreement"). (*See generally* Compl. (Dkt. # 1); *id.*, Ex. A ("Agreement"); 2d Am. Ans. (Dkt. # 41) at Counterclaims ¶¶ 1-27; *see also* 4/10/23 Order (Dkt. # 40) at 2-8 (setting forth the detailed factual and procedural background of this case).) Olympic, as the Charterer, and Lovel Briere, as the Owner, entered into the Agreement on May 22, 2013. (Compl. ¶ 8; *see* Agreement.) Relevant to the motion before the court, Section 7 of the Agreement provides:

Charterer shall procure and maintain, at its expense, the following insurances upon the Vessel during the charter term:

- a. hull and machinery insurance . . . ;
- b. protection [and] indemnity insurance . . . ;
- c. pollution and environmental liability insurance . . . ; and
- d. if required by the Owner and Owner's lender holding a mortgage on the Vessel, breach of warranty insurance

Each insurance shall be subject to Owner's approval, name Owner as an insured, be endorsed as primary to any insurance of Owner, and endorsed to require thirty (30) days written notice to each insured (including Owner) in the event of any cancellation, non-renewal or other material change in policy terms or conditions.

¹ Plaintiffs have requested oral argument; Lovel Briere has not. (*See* Resp. at 1; Mot. at 1.) The court finds that oral argument would not be helpful in disposing of the motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

1 (Agreement § 7.) On January 3, 2018, the parties executed an amendment that extended
2 the term of the Agreement. (*Id.* at 3.) The amendment did not alter Section 7 of the
3 Agreement and is silent regarding insurance. (*Id.*)

4 Plaintiffs filed this action on October 27, 2022, after Lovel Briere notified them
5 that it intended to double the hire rate for the Vessel effective November 1, 2022 and
6 declare Plaintiffs in default. (*See* Compl. ¶ 20; *id.*, Ex. B (letter from Lovel Briere
7 regarding the rate increase).) On November 21, 2022, Lovel Briere answered the
8 complaint and asserted counterclaims for reformation, rescission, fraud/material
9 representation, breach of contract, and conversion. (*See generally* Ans. (Dkt. # 23).) On
10 January 18, 2023, Lovel Briere filed an amended answer and counterclaims in which it
11 added a counterclaim for breach of the duty of good faith and fair dealing arising from
12 Plaintiffs' alleged refusal to renegotiate the hire rate for the Vessel. (Am. Ans. (Dkt.
13 # 35) at Counterclaims ¶¶ 22-23, 39-40; *see* 1/17/23 Order (granting the parties'
14 stipulated motion for leave for Lovel Briere to amend its answer).)

15 On April 10, 2023, the court granted in part and denied in part Plaintiffs' motion
16 to dismiss Lovel Briere's amended counterclaims. (*See generally* 4/10/23 Order (Dkt.
17 # 40).) The court dismissed Lovel Briere's breach of contract, reformation, and
18 conversion counterclaims with prejudice; dismissed the breach of the duty of good faith
19 and fair dealing counterclaim with leave to amend; and denied Plaintiffs' motion to
20 dismiss Lovel Briere's fraud / misrepresentation counterclaim. (*Id.* at 20.) Lovel Briere
21 filed a second amended answer and counterclaims on April 21, 2023. (*See* 2d Am. Ans.
22 (Dkt. # 41).) Although the court had granted Lovel Briere leave to amend its breach of

1 the duty of good faith and fair dealing counterclaim (*see* 4/10/23 Order at 20), Lovel
2 Briere did not reassert that counterclaim in its second amended answer (*see* 2d Am. Ans.
3 at Counterclaims ¶¶ 26-27).

4 On April 27, 2023, the court entered a scheduling order in which it set the deadline
5 to file amended pleadings on February 21, 2024; the deadline for completion of discovery
6 on April 22, 2024; the dispositive motions deadline on May 21, 2024; and the trial date
7 on August 19, 2024. (*See* Sched. Order (Dkt. # 42).) The court later granted the parties’
8 stipulated motion to extend the deadline to file amended pleadings to February 28, 2024.
9 (2/23/24 Order (Dkt. # 45).) Lovel Briere filed the instant motion for leave to amend on
10 that deadline. (Mot.) Plaintiffs filed a timely response on March 11, 2024, and Lovel
11 Briere filed its reply on March 15, 2024. (*See* Resp.; Reply.) Lovel Briere’s motion is
12 now ripe for decision.

13 III. ANALYSIS

14 Federal Rule of Civil Procedure 15(a)(2) states that “[t]he court should freely give
15 leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The court considers
16 the following factors when evaluating a motion for leave to amend: “(1) bad faith,
17 (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and
18 (5) whether plaintiff has previously amended his complaint.” *In re W. States Wholesale*
19 *Nat. Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013) (quoting *Allen v. City of*
20 *Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990)).

21 Lovel Briere seeks leave to file a third amended answer and counterclaims to add a
22 new counterclaim for breach of the duty of good faith and fair dealing arising from

1 Plaintiffs’ alleged refusal to provide copies of their insurance policies. (*See generally*
2 Mot.; *see* Prop. 3d. Am. Compl. at Counterclaims ¶¶ 26-31, 34-35.) Lovel Briere alleges
3 that it “repeatedly requested copies of [Plaintiffs’] insurance documents so that [it] could
4 ensure that there had been no material changes in policy terms and conditions” in
5 accordance with its “contractual right to approve—or disapprove—the charterer’s
6 insurance policy” under Section 7 of the Agreement. (Prop. 3d Am. Ans. at
7 Counterclaims ¶ 27.) It asserts that, it “could not assess whether [Plaintiffs’] insurance
8 coverage was adequate” based on insurance certificates Plaintiffs provided to it on March
9 3, 2023. (*Id.* ¶¶ 28-29.) Therefore, it “requested the full insurance documents [from
10 Plaintiffs’ parent company] via email on March 10, March 14, April 10, April 18, May
11 11, and June 14, 2023” and attempted to contact Plaintiffs’ parent company by telephone
12 on March 24, 2023. (*Id.* ¶ 29.) Nevertheless, according to Lovel Briere, Plaintiffs
13 refused to produce the policies. (*Id.* ¶¶ 30-31.) Lovel Briere argues that by refusing to
14 turn over the full insurance policies, “Plaintiffs have not cooperated with [Lovel Briere]
15 and, as a result, [Lovel Briere] has not obtained the full benefit of performance—
16 specifically, comfort that the vessel it has chartered to Plaintiffs is properly insured.”
17 (Mot. at 3.)

18 Plaintiffs oppose Lovel Briere’s motion to amend. They argue that (1) the
19 proposed amendment is futile, (2) Lovel Briere filed the motion in bad faith, (3) Lovel
20 Briere has unduly delayed moving to amend, (4) and allowing amendment just six weeks
21 before the end of the discovery period would be prejudicial. (*See generally* Resp.) The
22 court agrees that the proposed amendment is futile and that Lovel Briere unduly delayed

1 raising the claim. Because these two factors together justify denial of the motion to
2 amend, the court does not consider whether Lovel Briere has acted in bad faith or
3 whether granting leave to amend would also be prejudicial.

4 First, the court concludes that the proposed amendment is futile. Under
5 Washington law,² “[t]here is in every contract an implied duty of good faith and fair
6 dealing” that “obligates the parties to cooperate with each other so that each may obtain
7 the full benefit of performance.” *Rekhter v. Dep’t of Soc. & Health Servs.*, 323 P.3d
8 1036, 1041 (Wash. 2014) (quoting *Badgett v. Sec. State Bank*, 807 P.2d 356, 360 (Wash.
9 1991)). The implied covenant of good faith and fair dealing “cannot add or contradict
10 express contract terms and does not impose a free-floating obligation of good faith on the
11 parties.” *Id.* Instead, “the duty arises only in connection with terms agreed to by the
12 parties.” *Id.* (quoting *Badgett*, 807 P.3d at 360). In particular, the duty arises “when the
13 contract gives one party discretionary authority to determine a contract term.” *Id.*
14 (quoting *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 935 P.2d 628, 632 (Wash.
15 Ct. App. 1997)).

16 The court agrees with Plaintiffs that the amendment is futile—and denial of Lovel
17 Briere’s motion is appropriate—because Section 7 of the Agreement does not create a
18 duty for Plaintiffs to produce insurance documents at any time upon Lovel Briere’s
19 demand. (*See Resp.* at 8-10); *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112,
20 1116 (9th Cir. 2014) (“Futility of amendment can, by itself, justify the denial of a motion

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22 ² The parties agree that Washington law governs Lovel Briere’s proposed counterclaim.
(*See generally* Mot. (citing Washington law); Resp. (same).)

1 for leave to amend.”). Section 7 provides that the insurance policies procured by
2 Plaintiffs (1) “shall be subject to [Lovel Briere’s] approval” and (2) “shall
3 be . . . endorsed to require thirty (30) days written notice to [Lovel Briere] in the event of
4 any cancellation, non-renewal or other material change in policy terms or conditions.”
5 (Agreement § 7.) The court interprets this language as enumerating conditions that give
6 rise to Lovel Briere’s contractual right to review and approve Plaintiffs’ insurance
7 policies after Lovel Briere’s initial approval of the policies under Section 7. (*See* 2/16/23
8 Order (Dkt. # 37) at 10-11 (setting forth the legal standards governing interpretation of
9 maritime contracts).) Thus, Plaintiffs do not have a duty to produce the policy documents
10 absent the occurrence of such conditions. Because Lovel Briere does not allege that
11 Plaintiffs have canceled, failed to renew, or made material changes to their insurance
12 policies (*see generally* Prop. 3d Am. Ans. at Counterclaims), the court concludes that
13 Lovel Briere has not plausibly alleged that Plaintiffs violated their duty of good faith and
14 fair dealing by refusing to produce insurance documents on demand and disconnected
15 from any contractual trigger. Therefore, the court denies Lovel Briere’s motion to amend
16 as futile. *See Gonzalez*, 759 F.3d at 1116.

17 Second, the court concludes that Lovel Briere unduly delayed seeking leave to
18 amend. “In assessing undue delay, a court considers not just whether the motion
19 complies with the court’s scheduling order, but also when the moving party ‘knew or
20 should have known the facts and theories raised by the amendment.” *Alexanderson v.*
21 *Langton*, No. C13-1764JLR, 2014 WL 4094148, at *2 (W.D. Wash. Aug. 18, 2014)
22

1 (quoting *Amerisource Bergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir.
2 2006)). As Lovel Briere itself points out, it informed Plaintiffs that it intended to amend
3 its counterclaims on July 20, 2023—more than seven months before it filed this motion.
4 (See Reply at 2; *id.*, Ex. B at 2 (July 20, 2023 email from Plaintiffs’ counsel to Lovel
5 Briere’s counsel, attaching a certificate of insurance to demonstrate that Plaintiffs had
6 “procure[d] and maintain[ed] the necessary insurance coverage”); *id.* at 1 (Lovel Briere’s
7 response, stating that Lovel Briere “will be moving to amend our counterclaims to add
8 this most recent breach of the charter”).) Thus, Lovel Briere had knowledge of the facts
9 and theories underlying its potential counterclaim for breach of the duty of good faith and
10 fair dealing by no later than July 2023. Lovel Briere does not explain why it then waited
11 to file this motion until the February 28, 2024 deadline for amending pleadings. (See
12 *generally* Mot.; Reply.) Therefore, the court concludes that Lovel Briere’s delay in filing
13 this motion further supports denial of leave to amend. *AmerisourceBergen*, 465 F.3d at
14 953 (noting that the Ninth Circuit has “held that an eight month delay between the time of
15 obtaining a relevant fact and seeking a leave to amend is unreasonable” (citing *Texaco,*
16 *Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir. 1991)).

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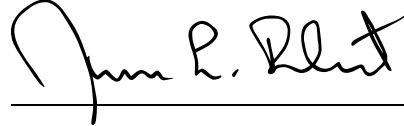
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IV. CONCLUSION

For the foregoing reasons, the court DENIES Lovel Briere's motion for leave to file a third amended answer and counterclaims (Dkt. # 46).

Dated this 20th day of March, 2024.

A handwritten signature in black ink, appearing to read "James L. Robart", written over a horizontal line.

JAMES L. ROBART
United States District Judge